Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Misc. No. 78-5419

GEORGE D. VAN CUREN,

PETITIONER,

-vs-

A. R. JAGO, SUPERINTENDENT,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals

for the Sixth Circuit

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IN THE

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GEORGE D. VAN CUREN,

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A. R. JAGO, SUPERINTENDENT,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals

For The Sixth Circuit

Petitioner George D. Van Curen respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on June 21, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, which is not reported, appears in the Appendix hereto.

The opinion of the United States District Court for the Southern District of Ohio, Western Division, which was based on a report and recommendation of a magistrate, is not reported. Both the opinion and the magistrate's report appear in the Appendix hereto.

The judgment and opinion of the Supreme Court of Ohio, reported at 45 Ohio St.2d 298, 345 N.E.2d 75, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 21, 1978. Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari were filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether summary rescission by a state parole board of a grant of parole on or after a date certain and subsequent summary denial of parole violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment.

Section 1 *** [N]or shall any state deprive any person of life, liberty, or property, without due process of law; ***.

Section 2967.01 of the Ohio Revised Code.

> "Parole" means the release from confinement in any state penal or reformatory institution by the adult parole authority created by section 5149.02 of the Revised Code and under such terms and for such period of time as shall be prescribed by the authority in its published rules and official minutes. A parolee so released shall be supervised by the authority.
> * * *

Section 2967.31 of the Ohio Revised Code.

> Notwithstanding any other provision for determining parole eligibility, a prisoner confined in a state penal or reformatory institution may be released on parole at any time after serving six months in the custody of the department of rehabilitation and correction, when all of the following apply:
>
> (A) The offense for which the prisoner was sentenced was an offense other than aggravated murder or murder.

> (B) The prisoner has not previously been convicted of any felony for which, pursuant to sentence, he was confined for thirty days or more in a penal or reformatory institution in this state or in a similar institution in any other state or the United States.
>
> (C) The prisoner is not a dangerous offender as defined in section 2929.01 of the Revised Code.
>
> (D) The prisoner does not need further confinement in a penal or reformatory institution for his correction or rehabilitation.
>
> (E) The history, character, condition, and attitudes of the prisoner indicate that he is likely to respond affirmatively to early release on parole, and is unlikely to commit another offense.

STATEMENT OF THE CASE

Upon his plea of guilty to embezzlement, forgery, and uttering and passing charges, petitioner George D. Van Curen was sentenced on May 22, 1972, to a term of incarceration for not less than six (6) nor more than 100 years (Van Curen Dep. at 11-14,23).[1/] Pursuant to Ohio's shock parole statute, O.R.C. §2967.31, Mr. Van Curen appeared on April 17, 1974 before a hearing panel consisting of one parole board member and a hearing officer. (Shoemaker Dep. at 10-11; Kowalski Dep. at 14-15). The panel recommended that he be granted parole on or after April 23, 1974, and the Ohio Adult Parole Authority (hereinafter OAPA) approved that recommendation that day. (Shoemaker Dep. at 11, Snyder Dep. at 10; 19-20).

On April 23, 1974, the OAPA summarily rescinded Mr. Van Curen's parole. (Coomer Dep. at 22-24). At no time during

1/ This case was submitted to the District Court below on depositions and briefs; therefore, reference to the record is made by citation of the name of the deponent and the relevant page(s).

the proceedings which resulted in the rescission of his parole grant was Mr. Van Curen given notice or an opportunity to be heard. (Snyder Dep. at 75, 91, 101-103). On June 20, 1975, the parole board convened to again consider shock parole for Mr. Van Curen, and the board summarily denied parole.

The board failed to allow Mr. Van Curen to call witnesses, have counsel or counsel-substitute, or confront adverse witnesses and review adverse reports upon whose authority parole was initially rescinded and later denied. No notice of the topics to be discussed was given Mr. Van Curen to allow him to become aware of the facts which formed the basis of either the rescission or denial, and no statement of facts or reasons for the board's actions was ever made. (Shoemaker Dep. Respondent's Stipulation at 46; Snyder Dep. at 71-72; Van Curen Dep. at 53, 76-79, 90-91).

On September 27, 1974, Mr. Van Curen initiated an original action in mandamus in the Supreme Court of Ohio challenging on due process grounds the procedures employed by the parole board. The writ was denied on March 24, 1976. This Court denied a petition for a writ of certiorari on November 15, 1976. Van Curen v. OAPA, No. 75-6955 (U.S., filed Jun. 21, 1976). On February 14, 1977, Mr. Van Curen filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Ohio, Western Division. The Writ was denied on August 24, 1977. That decision was affirmed by the Court of Appeals for the Sixth Circuit on June 21, 1978.

REASONS FOR GRANTING THE WRIT

1. THE FEDERAL CIRCUIT COURTS OF APPEALS HAVE RENDERED CONFLICTING DECISIONS ON THE DUE PROCESS RAMIFICATIONS OF PAROLE GRANTS AND RESCISSIONS.

Pursuant to Rule 19 of this Court's rules, one reason to be considered in granting the writ is "[w]here a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter." See AVCO Corp. v. Aero Lodge 735, 390 U.S. 557, 559 (1968). The circuits are in direct conflict on the issue of the due process ramifications of parole grants and rescissions. Compare Brown v. Lundgren, 528 F.2d 1050, 1052-53 (5th Cir.), cert. denied, 429 U.S. 917 (1976) and Scott v. Kentucky Parole Bd., No. 74-1899 (6th Cir., Jan. 15, 1975), vacated and remanded to consider mootness, 429 U.S. 60 (1976), on remand sub nom. Bell v. Kentucky Parole Bd., 556 F.2d 805, 806 (6th Cir. 1977); with Franklin v. Shields, 569 F.2d 784, 800 (4th Cir.) (en banc), cert. denied, _____ U.S. _____, 98 S.Ct. 1659 (1978); Inmates of Nebraska Penal & Correctional Complex v. Greenholtz, 576 F.2d 1274, 1281 (8th Cir. 1978); United States, ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), cert. denied, 425 U.S. 914 (1976); Childs v. United States Bd. of Parole, 511 F.2d 1270, 1280 (D.C. Cir. 1974); Bradford v. Weinstein, 519 F.2d 728, 732 & n.3 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975); and United States, et rel. Johnson v. Chairman, New York State Bd. of Parole, 500 F.2d 925 (2d Cir.), vacated as moot, 419 U.S. 1015 (1974) (grants). Compare McIntosh v. Woodward, 514 F.2d 95 (5th Cir. 1975) with Robinson v. Benson, 570 F.2d 920 (10th Cir. 1978) (rescissions).

To ensure uniformity of decisions in the federal courts of appeals, this Court should grant the writ. Otherwise, the due process rights of federal and state inmates will vary with geographic location, a result antithetical to the concept of a national constitution. Moreover, the number of decisions continues

to grow, not only in the Circuits, but also in the District and State courts, decisions that construe the same constitutional provision under nearly identical factual and legal situations to produce squarely and irreconcilably conflicting views of the due process interests in parole.

The importance of this issue is clear: the way in which that liberty expressly protected by the Fourteenth Amendment, Morrissey v. Brewer, 408 U.S. 471, 485-89 (1972), is granted or rescinded affects both every inmate in this country and, due to the impact of the corrections process on society, Morrissey, 408 U.S. at 484; Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973), every citizen as well. In our constitutional scheme, procedural safeguards are deemed important because "[i]t is procedure that spells much of the difference between rule by law and rule by whim or caprice." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

Absent interpretation by this Court, the constitutional protection given an inmate's parole status will continue to differ solely because the parameters of the Due Process Clause have not yet been set on this issue. As the divergent precedent reflects, the variance does not rest on dissimilar state laws, but rather on contradictory readings of the Fourteenth Amendment and differing applications of the Morrissey and Wolff v. McDonnell, 418 U.S. 539 (1974), decisions. Thus, the writ must be granted to resolve this conflict.

2. WHAT THE DUE PROCESS RAMIFICATIONS OF PAROLE GRANTS AND RESCISSIONS ARE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH THIS COURT SHOULD ANSWER.

A second catalyst for granting a writ under Rule 19 is the nature of the legal issue. "Where a court of appeals. . .has decided an important question of federal law which has not been, but should be, settled by this court," the writ may be granted. Sup.

Ct. R. 19(1)(b). At issue here is an important federal question about interpretation of the Due Process Clause and application to a corrections process that touches on both inmate and societal interests. If the conflicting decisions and geographical variations are to stop, the issue must be settled by the only court with the power to ultimately resolve legal questions about construction of the Constitution of the United States. Moreover, this Court should act because, in large measure, the lower federal courts have been stymied by this Court's decisions.

> The Supreme Court has not decided the exact question before us of whether a prisoner's interest in prospective parole is an interest to be afforded protection under the due process clause of the Fourteenth Amendment. It must be acknowledged that there are indications both ways in recent Supreme Court opinions.

Inmates of the Nebraska Penal & Correctional Complex v. Greenholtz, 576 F.2d at 1279 (citation omitted). See also Williams v. Ward, 556 F.2d 1143, 1157 (2d Cir.), cert. dism., 434 U.S. 944 (1977) ("Whether the Supreme Court will adjudge a parole applicant's interest in the prospect of conditional liberty on parole to be insufficient to trigger due process protections is still unsettled, ...The past observations of the Court have pointed in both directions.") (citation omitted).

Importantly, resolution of the due process issue is not simply a matter of state law. Cf. Meachum v. Fano, 427 U.S. 215 (1976). Rather, the Morrissey-Wolff grievous loss analysis of the Due Process Clause liberty interest in parole has been relied on by lower federal and state courts to reach conflicting results. See, e.g., Jackson v. Wise, 390 F. Supp. 19, 30 (C.D. Cal. 1975); Williams v. United States Bd. of Parole, 383 F. Supp. 402, 404 (D. Conn. 1974); Demar v. Wainwright, 354 So.2d 366 (Fla. 1977), cert. denied, ____ U.S. ____, 98 S.Ct. 3082 (1978); Sexton v. Wise, 494 F.2d 1176, 1178 (5th Cir. 1974). Indeed, the same issue

plagues the United States Parole Commission. Drayton v. McCall, 445 F. Supp. 305, 308 (D. Conn. 1978).

Parole procedures and criteria are essentially the same in every state. The enabling laws raise, as does Ohio's, an expectation both that compliance with the enumerated criteria will lead to parole and that such compliance will be gauged in a manner consistent with the constitutional significance of the property and liberty interest created by enactment of a parole process. The essential issue is not the state law's procedural safeguards; instead, the issue is whether, as a matter of federal constitutional law, an interest is created which merits due process protection. Then, whatever procedures state law provides can be measured against the Morrissey, 408 U.S. at 485-89, and Wolff, 418 U.S. at 563-71, models of the process that is due.

Thus, "[t]he constitutional issue is whether either the outright denial, or the imposition of parole conditions, has the kind of impact on liberty that must be preceded by 'due process'." Scott, 429 U.S. at 60-61 (Stevens, Brennan and Powell, J. J., dissenting). That issue has not been, but should be, decided by this Court; therefore, the writ must be granted.

3. PETITIONER WAS DEPRIVED OF A PROPERTY AND LIBERTY INTEREST WITHOUT DUE PROCESS.

Though the decisional law conflicts, the proper interpretation of the Due Process Clause yields protection for parole grants and rescissions. A due process interest, anchored in state law, and custom,is created by parole statutes and should not be denied without a constitutionally sufficient procedure to determine whether the statutory criteria were satisfied. See Jacobs, "Parole: An Interest in Due Process," 6 Cap. U. L. Rev. 205 (1976). That interest, traceable from the conditional liberty recognized in Morrissey, is at stake when the parole decision is made - the prisoner will be set free, albeit on conditional release. See Johnson, 500 F.2d at 928. Further, in rescinding a parole grant, some interest is clearly divested of the inmate. See Jackson, 390 F. Supp. at 30.

A writ must issue to the Court of Appeals for the Sixth Circuit because its decision denying due process protection to petitioner failed to recognize the property and liberty interest he had in both the rescission of his parole grant and its subsequent denial. As the briefs will show, the facts used, to the extent discovery in the proceedings below has ascertained them, there being no statement of reasons for the parole board's actions, were susceptible to refutation and explanation. Yet, petitioner was not given the minimal safeguards of fair notice and a meaningful opportunity to be heard. Joint Anti-Fascist Committee, 341 U.S. at 168 (Frankfurter, J., concurring).

CONCLUSION

This issue will not go away. It has often been before the Court for merits review, but remains an unsettled question. Uniformity is appropriate and necessary, but divergent lower court opinion are continuing to be rendered. The importance of the due process ramifications of parole grants and rescissions stems from the number of parole release decisions, their critical significance to a prisoner, and the amount of litigation that a lack of resolution foments. Scott, 429 U.S. at 61 n.1 (Stevens, Brennan, and Powell, J. J., dissenting). For these and the foregoing reasons, the writ must be granted.

Respectfully submitted,

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APPENDIX

FILED
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U.S. DISTRICT COURT
SOUTHERN DIST.
WEST DIV. CINCINNATI

NO. 77-3558

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

C-1-77-67

GEORGE D. VAN CUREN

Petitioner-Appellant

v.

ARNOLD R. JAGO, Superintendent

Respondent-Appellee

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O R D E R

BEFORE: PHILLIPS, Chief Judge; and LIVELY and KEITH, Circuit Judges.

This is an appeal from denial of a petition for habeas corpus. The petitioner, a state prisoner, was selected for "shock parole" at a future date and was so advised. Petitioner then prepared and submitted a parole plan which was never approved. Prior to the date on which he would have been released on shock parole the parole board rescinded its previous decision on the basis of a determination by a parole board investigator that there was a misrepresentation in the petitioner's parole plan and that he had misrepresented the magnitude of his crime at his hearing.

Upon consideration of the briefs and oral arguments of counsel together with the record on appeal the court concludes that the petitioner had an expectation of release on parole at most and that he had neither a property interest nor a liberty

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interest which entitled him to a due process hearing on rescission of the earlier decision to grant shock parole. The court concludes that Morrissey v. Brewer, 408 U.S. 471 (1972), which dealt with the rights of one already free on parole does not require a decision different from that reached in this case.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

A TRUE COPY.
Attest:
JOHN P. HEHMAN, Clerk
By [signature]
Deputy Clerk

Issued as Mandate: July 13, 1978
COSTS: None

3/

FILED
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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WEST DIV. CINCINNATI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GEORGE D. VAN CUREN — NO. C-1-77-67

Petitioner,

v.

A. R. JAGO, Supt., — ORDER

Respondent.

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This habeas corpus case was submitted on the petitioner's petition (doc. 2), respondent's return of writ (doc. 5), petitioner's reply to return of writ (doc. 7) and the respondent's reply to petitioner's reply (doc. 9).

The matter was referred to the United States Magistrate for report and recommendation pursuant to Western Division Rule No. 1, In re: United States Magistrate, filed June 22, 1977.

The matter is before the Court now on such report and recommendation of the Magistrate.

After consideration, the Court finds the report well reasoned and the recommendation that the petition for writ of habeas corpus be denied is supported by applicable law.

The Court therefore approves and adopts the report of the Magistrate at its own. Accordingly, for reasons set out in the report of the Magistrate, the petitioner for writ of habeas corpus is hereby denied.

David D. Porter
United States District Judge

AUG 26 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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W. DIV.

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GEORGE D. VAN CUREN, :

Petitioner, : NO: C-1-77-67

vs. :

A. R. JAGO, SUPERINTENDENT, : REPORT OF MAGISTRATE

Respondent. :

Inmate George D. Van Curen has filed a petition for writ of habeas corpus seeking to set aside the rescission of his parole on the ground that the rescission violates his constitutional rights. The essential facts are as follows:

After entering a plea of guilty to charges of embezzlement, forgery and uttering and passing forged instruments in the Cuyahoga County Court of Common Pleas, petitioner was sentenced on May 22, 1972 to a term of not less than six nor more than 100 years in the Ohio Penitentiary. In January of 1974, the Ohio legislature enacted O.R.C. § 2967.31, which permitted inmates such as petitioner to be considered for shock parole (early parole). A panel consisting of a Parole Board member and a hearing officer interviewed Mr. Van Curen, and on April 17, 1974, granted him shock parole "on or after" April 23, 1974.[1/]

1/ An "on or after" date is used in granting parole since any grant is conditional pending approval and investigation of the parole plan which the inmate must prepare once he is granted parole (Shoemaker, Depo., p. 30).

Presumably the two hearing officers had been impressed with both the information Mr. Van Curen gave them at the hearing and his record. Petitioner had no prior criminal record, had not been disciplined while incarcerated, and had been commended for his performance during 1000 hours of nurse's training at the Correctional Medical Center's James Hospital. Also, he had received a graduate diploma and a high job performance rating as a clerk while in prison, and he had a job waiting upon his release.

He described his crime as the embezzlement of approximately one million dollars and said he had cooperated with attempts to recover the lost funds.

On April 23, 1974, after petitioner had begun the release process but while he was still incarcerated, the Parole Board rescinded its grant of parole. The Board issued special minutes which stated that the "technical matters pertaining to this case should be more fully explored" (Doc. 2, attachment D). The Board did not base its action on information produced by the routine investigation, mentioned above, to which all parolees are subjected before release. In fact, the Board had not received any official report. The record indicates, however, that the Board did receive additional information which caused it to suspect that the decision to grant parole was unsound.

While the Board was in session on April 23, 1974, the Board's absent chairman, Nolan Snyder, telephoned to report he had learned that in the parole plan petitioner had submitted, he had stated falsely that he would be living with his half-brother while on parole. Actually, the man named was not related to petitioner at all, although Mr. Van Curen has testified that the sponsor was close to

his family. Snyder reported further that the magnitude of petitioner's crime had not been described fully to the original panel (Snyder deposition at p. 31). The amount stolen had been closer to six million dollars than to the one million dollars admitted by petitioner. Snyder also informed the Parole Board that the trial judge and the prosecuting attorney had protested vigorously the granting of shock parole to petitioner (Snyder deposition at p. 23-4). In addition, Snyder apparently thought the Board should take into consideration the community attitude in the Cleveland area which was against Van Curen's being paroled. The local paper, for instance, had printed articles criticizing the panel's decision, and the Board had received correspondence adverse to petitioner (Doc. 2, p. 5).

The day after the Board tentatively rescinded Mr. Van Curen's parole, he was notified of that action and scheduled to appear before the full Board for a hearing at its June meeting. At that meeting on June 20, 1974, petitioner's shock parole was denied.

In his petition, Mr. Van Curen contends that the actions taken by the Board after granting parole on April 17, 1974 denied him due process of law. He claims that he should have been given a neutral hearing with notice of the topics to be discussed, opportunity to present and confront witnesses and access to the information upon which the Board was relying. He argues that his right to these procedures is grounded in state law and supported by precedent.

The theory that petitioner has a due process interest grounded in state law stems from a Supreme Court decision, Wolff v. McDonnell, 418 U.S. 539 (1974). In Wolff, the Court

decided that a prisoner must be given a hearing before being deprived of good time. In doing so, it looked to the state statute which created the right to good time.

The Court noted that:

> The State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct,... [the Due Process Clause requires] that the State created right is not arbitrarily abrogated. 418 U.S. at 556-7.

Thus, where the state establishes statutory rights and a standard for their denial, i.e., "major misconduct," the state must afford the prisoner minimal due process to ascertain whether that standard has, in fact, been violated.

In contrast, the shock parole statute under which Mr. Van Curen tentatively was granted parole does not provide a standard for its recision. Therefore, there exists no state created right to procedural safeguards before he may lose his grant of shock parole. In fact, far from giving the petitioner a definite interest in shock parole which has been granted but not effected, the Ohio legislature has left his status entirely within the discretion of the Parole Board. It is well settled in Ohio that the Pardon and Parole Commission may rescind the granting of parole prior to the time of its taking effect. Zenz v. Alvis, 66 Ohio L. Abs. 606, Ohio Appeals, Second District, 1951. Moreover, the word "parole" as used in the statute means the actual release from confinement, State ex rel Newman v. Lowery, 61 Ohio L. Abs. 337, aff'd. 157 O.S. 463 (1952). Thus, petitioner's situation

does not fall within the reasoning of the Wolff doctrine.

Nor do other cases cited by petitioner create a right to a hearing before the Board may rescind his parole. The only appellate level case directly in point which the parties have cited to us, Sexton v. Wise, 494 F. 2d 1176 (5th Cir. 1974), is adverse to petitioner. In that case the Court held that a prisoner, who had been granted a future date for parole which was summarily rescinded,

> was not entitled to a hearing since the process of obtaining parole had never reached completion and the due process protections of Morrissey v. Brewer [discussed infra] applicable to revocation were not applicable, 494 F. 2d at 1177.

We adopt the reasoning of Sexton to decide this case.

Recent decisions of both the Supreme Court and the Court of Appeals for the Sixth Circuit support our holding.

The case most favorable to Mr. Van Curen which bears discussion is Morrissey v. Brewer, 408 U.S. 471 (1972). There the Court stated that,

> The liberty of a parolee, although indeterminate...is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal. 408 U.S. at 482.

Morrissey is distinguishable from a case where the parolee has not yet been released. The language used by the Court in Morrissey indicates that the distinction is a valid one.

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted

> of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible self-sufficient person. 480 U.S. at 482.

Petitioner, of course, was not released from prison. In addition, the initial evaluation of his ability to return to society has been discredited.

Supreme Court decisions of the past two years exhibit a more stringent limitation of the due process rights of prisoners than did Morrissey. The following cases address the issue of whether a due process hearing must precede certain changes in a prisoner's status. In Baxter v. Palmagiano, 425 U.S. 308 No. 74-1187, (April 20, 1976), the Court held that Wolff notwithstanding, the rights of the prisoner in prison disciplinary proceedings, including the right to counsel and confrontation of witnesses, are within the sound discretion of the prison officials and may be denied summarily.

Montanye v. Haymes, 427 U.S. 236, No. 74-520 (June 25, 1976), involved the transfer of prisoners to less desirable institutions. Montanye held that where under state law the prisoner has no justifiable expectation that he would not be transferred, the Due Process Clause of the Fourteenth Amendment does not require a hearing in connection with the transfer of a prisoner. The holding of Montanye is especially damaging to petitioner's case since the Montanye Court refused to subject the motives of the officials who made the changes to constitutional review.

Consistent with these Supreme Court cases, the Court of

Appeals for the Sixth Circuit recently held that prisoners are not entitled to certain procedural rights before placement in more restrictive security penitentiaries, or before significant and adverse effects. The procedural rights which the Court concluded are unnecessary include the right to written notice of the charges, the right to call witnesses and produce evidence, the right to confront the accusing officer, the right to cross-examine adverse witnesses, the right to a written decision based only upon the evidence produced at the hearing and the right to counsel or counsel substitute in certain situations. (Walker v. Hughes, ____ F. 2d _____, No. 76-1974, June 24, 1977.)

This review of cases discloses that the officials of the prison system may make changes in the status of prisoners within their custody without granting any procedural protection whatsoever. Petitioner Van Curen, therefore, has no remedy in federal court (Sexton, supra). For this reason, it is recommended that the petition for writ of habeas corpus be denied.

J. Vincent Aug Jr.
United States Magistrate

THE STATE, EX REL. VAN CUREN, *v.* OHIO ADULT PAROLE AUTHORITY ET AL.

[Cite as State, ex rel. Van Curen, v. Adult Parole Authority (1976), 45 Ohio St. 2d 298.]

Mandamus—To compel Adult Parole Authority to recall order—Writ denied, when.

(No. 74-802—Decided March 24, 1976.)

IN MANDAMUS.

Mr. Louis A. Jacobs and *Mr. Stanley K. Laughlin, Jr.*, for relator.

Mr. William J. Brown, attorney general, and *Mr. Thomas D. Rooney*, for respondents.

Per Curiam. On April 17, 1974, relator was granted shock parole by respondent Ohio Adult Parole Authority, to be effective on or after April 23, 1974. Before relator was released from custody, respondent rescinded the action taken on April 17, 1974, and continued the matter of relator's parole for further investigation to June 1974. On June 20, after a hearing, parole was denied.

Relator, who remains incarcerated, now seeks an order of this court to compel respondent to recall its decision of June 20, 1974, and make effective the action taken April 17, 1974.

Relator argues that when respondent granted him parole effective on or after April 23, 1974, an interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution attached to relator and could not be rescinded or continued by respondent without a hearing. This is argued notwithstanding the fact that the grant of parole was rescinded before relator was to be released from confinement.

The Adult Parole Authority has no regulation requiring a hearing prior to rescinding the grant of a parole before release.

In *State, ex rel. Newman*, v. *Lowery* (1952), 157 Ohio St. 463, involving a similar fact situation, this court stated that the "* * * [Pardon and Parole] Commission had authority to rescind its order * * * granting a parole effective on or after a future date. * * *"

Mandamus lies only to command performance of an action which the law specially enjoins as a duty resulting from an office, trust or station. R. C. 2731.01. No such duty having been shown, the writ is denied.

Writ denied.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

Supreme Court, U. S.
FILED
DEC 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5419

GEORGE D. VAN CUREN, Petitioner

vs.

ARNOLD R. JAGO, SUPT., Respondent

ENTRY OF APPEARANCE OF COUNSEL

SIMON B. KARAS, a member of the bar of this Court, hereby enters his appearance as counsel of record on behalf of respondent, Arnold R. Jago.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5419

GEORGE D. VAN CUREN, Petitioner

vs.

ARNOLD R. JAGO, SUPT., Respondent

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE SIXTH CIRCUIT

QUESTION PRESENTED

I. WHETHER THE COURTS BELOW PROPERLY FOUND THAT DUE PROCESS PROTECTIONS ARE NOT APPLICABLE TO A PAROLE RESCISSION MADE PRIOR TO RELEASE FROM THE INSTITUTION.

STATEMENT OF THE CASE

On May 22, 1972, Petitioner George D. Van Curen (hereinafter "Van Curen") was sentenced to a term of not less than six (6) years and no more than one hundred (100) years following his plea of guilty to two counts of embezzlement, four counts of forgery, four counts of uttering and publishing forged instruments and one count of obtaining money under false pretense in violation of Sections 2907.34, 2913.01, 2913.01, and 2911.01, Ohio Revised Code, respectively.

Under the sentence imposed by the Court of Common Pleas of Cuyahoga County, Ohio, Van Curen was eligible for parole in March of 1976. However, on January 1, 1974, the "shock parole" statute, Section 2967.31, Ohio Revised Code, was enacted.

Pursuant to a formal opinion of the Ohio Attorney General Number 74-005 issued January 24, 1974, the Ohio Department of Rehabilitation and Correction determined that he was eligible for consideration for early parole under the provisions of the shock parole statute contingent upon meeting the applicable criteria.

On April 17, 1974, Van Curen appeared before a two-man panel representing the parole board. This panel recommended to the parole board "POA April 23, 1974."[1] On the same day, the parole board approved the recommendation.

Upon receipt of information that Van Curen had not been truthful to the panel nor truthful in his parole plan, the parole board, on April 23, 1974, rescinded the action taken at the April 17, 1974 meeting and voted to continue the cause until June, 1974 for further investigation and complete report.

On June 20, 1974, the parole board met at London Correctional Institute to conduct the continued hearing of Van Curen's application for shock parole. Based upon all the facts presented to the board, they voted unanimously, to deny his application.

---

[1] An "on or after" date is used in granting parole since any grant is conditional pending approval and investigation of the parole plan which the inmate must prepare once he is granted parole. [Shoemaker Depo., page 30. This case was submitted to the District Court below on depositions and briefs; therefore, reference to the record is made by citation of the name of the deponent and the relevant page(s)].

On May 16, 1974, Van Curen filed an original petition for a writ of habeas corpus in the Supreme Court of Ohio. (Case Number 74-446).

On September 6, 1974, the Supreme Court of Ohio dismissed his petition for a writ of habeas corpus.

On August 28, 1974, Van Curen then filed an original mandamus action in the Ohio Supreme Court.

On March 24, 1976, the Supreme Court of Ohio denied the writ requested by Van Curen. State ex rel. Van Curen v. Adult Parole Authority, 45 Ohio St. 2d 298 (1976) (Van Curen Appendix at A-11).

On November 15, 1978, this Court denied a petition for a writ of certiorari concerning Van Curen's mandamus action. Van Curen v. OAPA, Number 75-6955 (U.S., filed June 21, 1976).

On February 14, 1977, Van Curen filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Ohio, Western Division.

On August 1, 1977, Judge David S. Porter referred the matter to the Magistrate who filed a report on August 24, 1977. On the same date, Judge Porter adopted the Magistrate's report and denied the petition for a writ of habeas corpus. (Van Curen Appendix at A-3 to A-10).

Van Curen next filed a notice of appeal in the Sixth Circuit Court of Appeals. The case was briefed and argued. The Court affirmed the District Court's judgment. Case Number 77-3558. (Van Curen Appendix at A-1).

Van Curen then filed the instant petition for a writ of certiorari thereby bringing the issues contained therein before this Court for consideration.

ARGUMENT

I. WHETHER THE COURTS BELOW PROPERLY FOUND THAT DUE PROCESS PROTECTIONS ARE NOT APPLICABLE TO A PAROLE RESCISSION MADE PRIOR TO RELEASE FROM THE INSTITUTION.

Respondent would submit that before the procedural dictates of the due process clause are applicable, there must be a deprivation of a liberty or property interest. Board of Regents v. Roth, 408 U.S. 564 (1972); Bell v. Kentucky Board of Parole, 536 F. 2d 803 (6th Cir. 1977).

To be sure, Respondent would agree that the loss of freedom resulting from the revocation of parole or probation requires due process protections. Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973). However, the denial of a parole or its rescission is not such a "grievous loss".

It is submitted that to determine what is a liberty or property interest one must look to the identifying nature of the underlying substantive interests at stake in order to determine the interests that are subsumed under either "liberty" or "property".

This Court has held in Roth, supra, that:

> "To determine whether Due Process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." (Roth, supra, pages 570-571).

This Court then proceeded to find that Roth's interest in continued employment, i.e., his desire for renewal, was neither a "liberty" nor a "property" interest and therefore he could be deprived of that interest without due process.

The Roth, supra, decision points out that although a "grievous loss" may be a necessary prerequisite to the application of due process protections, it is not sufficient alone. The fact that an interest may be substantial does not require the activation of due process protection.

In the instant case, Van Curen's "interest" in being paroled may be substantial but that does not resolve this case. There must first be an inquiry into whether the interest that may be deprived is a constitutionally cognizable "liberty" or "property" interest.

A person convicted of a crime sentenced to imprisonment and confined as a result of a sentence has, in the most basic sense, lost his "liberty" for the period of his sentence. He is lawfully under the physical control of the state. "Lawful

incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266 at 285 (1948).

Respondent would submit that a prisoner has been lawfully deprived of his generalized constitutional liberty interest in freedom from confinement by his conviction and sentence. Hence, there is no "liberty" interest to protect in the instant case.

Respondent would submit that Van Curen does not have a constitutionally cognizable "property" interest in being released from confinement. The Supreme Court of Ohio in State ex rel. Newman v. Lowery, 157 Ohio St. 463 (1953), cert. denied, 344 U.S. 881 (1952), in reviewing a case similar to the one before the Court, affirmed the lower court's decision that "an order of the pardon and parole commission [now the Ohio Adult Parole Authority] granting prisoner a parole at a future date could be rescinded by commission before actual release of the prisoner without showing cause for such rescission in view of the fact that parole never became effective." State ex rel. Newman v. Lowery, 61 Ohio L. Abs. 337, 104 N. E. 590 (C.A. Franklin Cty. 1951).

The Supreme Court of Ohio in deciding Van Curen's petition for a writ of mandamus cited Lowery, supra, as authority that: ". . . [pardon and parole] commission had authority to rescind its order . . . granting a parole effective on or after a future date."

"Parole" is presently defined in Section 2967.01(E), Ohio Revised Code as: ". . . the release from confinement in any state penal or reformatory institution by the Adult Parole Authority. . . ." Therefore, there existed no property interest that necessitated due process protection.

The Sixth Circuit Court of Appeals does not stand alone on this issue. The Fifth Circuit Court of Appeals has reached the same result in Sexton v. Wise, 494 F. 2d 1176 (5th Cir. 1974) and McIntoch v. Woodward, 514 F. 2d 95 (5th Cir. 1975).

Van Curen notes for the Court that the Tenth Circuit Court of Appeals has reached a different conclusion in Robinson v. Benson, 520 F. 2d 920 (10th Cir. 1978).

Respondent would assert Robinson, supra, is distinguishable from the instant case. The Court in Robinson, supra, found that 28 C.F.R. Section 2.34 (1976) and Sections 2.12 and 2.13 necessitate certain requirements. Included were the notice of charges, hearings, and written reasons for the denial of parole. Also the Court found that regulations provided for a counsel substitute.

No such statutory requirement exists in Ohio. The Supreme Court of Ohio noted that no regulation required a hearing prior to rescission of a parole grant before release. State ex rel. Van Curen, supra.

Van Curen, in a supplemental brief, also argues, in part, that because this Court granted certiorari in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 576 F. 2d 1247 (8th Cir. 1978), cert. granted, No. 78-201, rep'd at 47 U.S.L.W. 3190 (Oct. 3, 1978) that the instant petition should receive similar treatment. Respondent cannot agree.

In Nebraska, pursuant to statute, an inmate is entitled to parole when he falls within certain stated categories. See Inmates of Nebraska Penal, etc. v. Greenholtz, 576 F. 2d 1274 (1978) at pages 1280-1281, footnote 3.

The case in Ohio is reversed. Section 2967.31, Ohio Revised Code, states:

> "Notwithstanding any other provision for determining parole eligibility, a prisoner confined in a state penal or reformatory institution may be released on parole at any time after serving six months in the custody of the department of rehabilitation and correction, when all of the following apply:
>
> (A) The offense for which the prisoner was sentenced was an offense other than aggravated murder or murder.
>
> (B) The prisoner has not previously been convicted of any felony for which, pursuant to sentence, he was confined for thirty days or more in a penal or reformatory institution in this state or in a similar institution in any other state or the United States.
>
> (C) The prisoner is not a dangerous offender as defined in section 2929.01 of the Revised Code.
>
> (D) The prisoner does not need further confinement in a penal or reformatory institution for his correction or rehabilitation.
>
> (E) The history, character, condition, and attitudes of the prisoner indicate that he is likely to respond affirmatively to early release on parole, and is unlikely to commit another offense.

It is well settled in Ohio that parole is a matter of grace. Cox v. Maxwell, 366 F. 2d 765 (6th Cir. 1966); Dimarco v. Denton, 385 F. 2d 556 (6th Cir. 1967); Rose v. Haskins, 388 F. 2d 91 (6th Cir. 1968).

As the statute clearly provides, an inmate may be considered only when he meets all of the statutory criteria, and even at that point, his release on parole is within the sound discretion of the Ohio Parole Board.

Respondent submits that given the above analysis that there exists no compelling reason to grant certiorari in this case simply because the Court determined that in Greenholtz, supra, such action was warranted.

Moreover, Respondent would submit that due to this Court's crowded docket that some consideration must be given to what impact this case will have upon our nation as a whole.

When one looks at the small populace effected by such case in Ohio, there exists no compelling reason for this Court to grant certiorari.

During the course of this litigation, it was developed that out of ten thousand (10,000) parole hearings per year, six thousand (6,000) parole grants are awarded with somewhere between nine (9) to twelve (12) such grants being rescinded. (Nolan Snyder Depo., pages 73-74 and 112-113; Shoemaker Depo., page 14). This clearly evidences that very few people will be touched by a decision in this case.

However, should the Court determine that this issue does have far reaching results, Respondent would submit that this case does not present the Court with a factual background which permits an undisturbed review of due process considerations in the area of parole rescissions.

The record is clear that Van Curen was untruthful concerning his parole plan. He admitted that his sponsor was not his half-brother but rather a homosexual lover. (Van Curen Depo., page 59, et seq.).

Given this misrepresentation, as well as others, Van Curen could not have even had an expectation of release. Certainly he did not have a vested interest requiring due process protections. Consequently, this case does not provide the Court with the opportunity to review the question of due process in a parole rescission free of any factual taint.

CONCLUSION

For all the foregoing reasons, Respondent prays that the petition for a writ of certiorari filed herein be denied. Rice v. Sioux City Memorial Cemetary, 349 U.S. 79 (1970).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response To Petition For A Writ Of Certiorari has been forwarded to petitioner's counsel, Louis A. Jacobs, 1659 North High Street, Columbus, Ohio, 43210, via the U.S. Postal Service, this 28th day of November, 1978.

Simon B. Karas
SIMON B. KARAS
Assistant Attorney General

Supreme Court
F I L E D
DEC 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Misc. No. 78-5419

GEORGE D. VAN CUREN,

Petitioner

-vs-

ARNOLD R. JAGO, SUPERINTENDENT,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

REPLY BRIEF OF PETITIONER

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IN THE

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A. R. JAGO, SUPERINTENDENT,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For The Sixth Circuit

REPLY BRIEF OF PETITIONER

This Reply Brief, filed pursuant to Sup. Ct. R. 24(4), addresses four arguments first raised in Respondent's Response to Petition: (1) the degree to which a residuum of liberty is retained by a prisoner; (2) the role of Ohio's statute as an anchor for a due process interest; (3) the impact of review by this Court; and (4) the propriety of review on the factual record presented by this case.

PRELIMINARY STATEMENT

In his Petition for Certiorari, docketed September 19, 1978, Petitioner Van Curen sought review of the judgment and opinion, entered on June 21, 1978, of the United States Court on Appeals for the Sixth Circuit, which held that summary rescission of a grant of parole did not violate the constitutional guarantee of due process. A Supplemental Brief was filed by Petitioner on November 16, 1978, after this Court had granted certiorari in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, No. 78-201 (Oct. 3, 1978), on the issue of the due process ramifications of parole grants.

Four reasons for granting this petition have been asserted. First, the federal circuit courts of appeals, as well as district and state courts, are in conflict on the constitutional issue. Compare Brown v. Lundgren, 528 F.2d 1050, 1052-53 (5th Cir.), cert. denied, 429 U.S. 917 (1976), with Franklin v. Shields, 569 F.2d 784, 800 (4th Cir.) (en banc), cert. denied, 435 U.S. 1003 (1978) (grants); McIntosh v. Woodward, 514 F.2d 95 (5th Cir. 1975); with Robinson v. Benson, 570 F.2d 920 (10th Cir. 1978) (rescissions).

Second, the issue is an important question on construction of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Language in Morrissey v. Brewer, 408 U.S. 471 (1972), Wolff v. McDonnell, 418 U.S. 539 (1974), and Meachum v. Fano, 427 U.S. 215 (1976), has fueled the conflict of lower courts on the issue; thus, this Court's guidance is necessary to avoid conflicting interpretation of the same constitutional provision as applied to a substantial interest: whether prisoners across the country are to have parole, their chance to be set free, considered by a fair procedure.

Third, Petitioner Van Curen had a constitutionally cognizable interest, arising both from the grievous loss he suffered by the summary rescission and subsequent denial of his grant of parole and by operation of Ohio's shock parole statute, O.R.C. §2967.31, as the parole board has customarily implemented the statute. That interest merited protection because Petitioner Van Curen had a justifiable expectation that compliance with statutory criteria would produce parole, and that once granted parole he would, in fact, be released. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Finally, this Court's grant of review in Greenholtz provides an opportunity, by granting this Petition, to resolve constitutional conflicts over both grants and rescissions of parole. Leaving the questions only half answered would disserve judicial economy by breeding more litigation and consequent petitions to this Court.

In response to these reasons for granting a writ of certiorari, Respondent asserts that prisoners lose their liberty upon incarcera-

tion. This Court has recognized, however, that some liberty interest is retained by the prisoner. Then, Respondent points to a difference in the Nebraska and Ohio statutes sub judice and suggests the difference distinguishes this Petition from Greenholtz. But, any difference in statute militates in favor of granting review in order to resolve totally, rather than in piecemeal fashion, the constitutional question. Moreover, the difference is not substantial: under both statutes, compliance with the enumerated criteria results in parole.

Respondent raises two arguments denigrating the importance of this case. Initially, Respondent submits so few rescissions have been made in Ohio that this case has little impact. Then, Respondent adds that the facts of this case make it unworthy of this Court's review. Yet, the impact of this case is nationwide, and the factual dispute is not dispositive of the due process issue; indeed, the dispute is indicative of why some process for fact finding was due.

For these and the reasons stated in the Petition and Supplemental Petition, Petitioner respectfully prays that this Court issue a writ of certiorari.

ARGUMENT

1. RESIDUUM OF LIBERTY

The Fourteenth Amendment to the Constitution of the United States provides that no state shall "deprive any person of life, liberty, or property, without due process of law." An inmate is no less a person, in constitutional terms, because of his or her incarceration. "There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff, 418 U.S. at 555-56.

Respondent equates the physical control exercised by the state over a prisoner with the liberty protected by the Due Process Clause. Although this Court has held that the liberty interest is "sufficiently extinguished" to allow states to transfer prisoners without due process safeguards, Meachum, 427 U.S. at 224, prisoners have consistently been afforded other rights through the Due Process Clause. See, e.g., Procunier v. Martinez, 416 U.S. 396, 405-06 (1974). Thus, "[r]escission of a parole release date, like prison disciplinary measures, impairs the 'residuum of liberty' of the prisoner..." Jackson v. Wise, 390 F. Supp. 19, 21 (C.D. Cal. 1975).

While certain rights and privileges may be curtailed incident to incarceration, denial of procedural safeguards in granting and rescinding parole is not a necessary concomitant of imprisonment. Respondent misplaces reliance on Price v. Johnston, 334 U.S. 266, 284-85 (1948), which involved a prisoner's asserted right to actually leave the prison and argue pro se an appeal. Unlike the restriction approved in Price, procedural safeguards do not directly affect the physical control of a prisoner; they do and should affect the length and conditions of that control.

2. STATUTORY ANCHOR

Respondent begins his discussion of Ohio's statutory provisions for parole by emphasizing that, under precedent decided before the "hands-off" doctrine succumbed in Morrissey and Wolff, no due process attached to grants and rescissions. That analysis avoids the central question: do the statutes themselves and their past implementation create an anchor for liberty or property interests.

To answer that question, Respondent attempts to distinguish the Nebraska statute before this Court in Greenholtz and the holding in Robinson. O.R.C. §2767.31 provides that shock parole may be granted when all the enumerated criteria apply; Neb. Rev. Stat. §83-1, 114 provides that parole must be granted unless any of the enumerated criteria apply. Greenholtz, 576 F.2d 1274, 1280 n.3 (8th Cir. 1978) (history omitted). The enumerated criteria

are quite similar, and the statutes' rationale of providing the parole board with legislative direction is identical.

Whatever substantive difference exists between the statutes is further cause for granting this Petition. In that way, the issues surrounding parole grants and rescissions can be settled in an efficient manner, not leaving for subsequent litigation any issue appropriate for resolution now.

Beyond that, though, the difference in the statutes is illusory. In Ohio, a canon of statutory construction is that utilization of the word "may" does not negate a statutory mandate. "Where the sense, purpose, or policy of a statute requires it, may as used in the statute will be construed as must or shall." State v. Board of Education, 127 Ohio St. 336, 339, 188 N.E. 556, 567 (1933). Under O.R.C. §2967.31, "may" is a term that permits release "[n]otwithstanding any other provision for determining parole eligibility." The thrust of the highly discretionary and encompassing enumerated criteria is that the parole board can, upon finding the criteria satisfied, release a prisoner. To suggest the parole board may find all the criteria satisfied and still deny parole is to render the legislative direction nugatory. The parole board could then act upon a totally arbitrary criterion, the color of an inmate's eyes, and still be faithful to the statute.

Moreover, the de facto implementation of the statute and the "mutual explicit understandings" between the parole board and the prisoner, as evidenced in the record, reflect a custom of granting parole without rescission. See Perry v. Sindermann, 408 U.S. 593, 601 (1972). As in Morrissey, implicit in the parole grant "is the notion that the parolee is entitled to retain his [grant of] liberty as long as he substantially abides by the conditions of his parole [grant]." 408 U.S. at 481-82. The process by which non-compliance with the criteria enumerated

in O.R.C. §2967.31 is determined and, for a rescission, redetermined must have procedural safeguards because the statute creates, like that in Wolff, interests conditioned on compliance with the criteria.

The grant to Petitioner Van Curen "established [a] right to conditional liberty at a specific future time." Kargler v. Sigler, 384 F. Supp. 10, 12 (D. Mass. 1974). That right should not have been rescinded absent a determination consistent with due process on compliance with the criteria in O.R.C. §2967.31. Both the initial grant and the rescission were based on those criteria and, at a minimum, the statutory "right to be considered eligible for release" is implicated. Bradford v. Weinstein, 519 F.2d 728, 730-31 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975). In addition, the right to receive parole is at stake because that is precisely the right the statute, as implemented, purports to grant upon compliance with its criteria.

The attempt Respondent makes to distinguish Robinson is likewise unavailing. That opinion first recognized the existence of a constitutional interest, then it surveyed the procedures provided. 570 F.2d at 922. The procedures surveyed were not relied upon to establish a right, nor should the absence of Ohio procedures negate the right. Instead, the statutory framework and de facto operation of the parole board create a constitutionally cognizable interest for which procedural safeguards must be provided.

3. IMPACT OF REVIEW

Because the number of rescissions in Ohio has been very limited, Respondent argues that this Petition does not present an important constitutional question. Interpretation of the Due Process Clause would, however, have an impact beyond Ohio's boundaries. The number of cases dealing with grants and rescissions reflects the need for judicial resolution of the

constitutional question, and limiting this Petition's impact to the historically few rescissions in Ohio is a patently invalid argument. Even if the Petition were so limited, the annual number of rescissions in Ohio amount to a case with impact beyond the single petitioner and upon an issue of utmost constitutional significance: the liberty of a prisoner.

4. FACTUAL UNDERPINNINGS

The final argument Respondent raises is that the facts of Petitioner Van Curen's rescission are so clear that procedural safeguards were unnecessary; so, this Petition is not free from "factual taint." Response to Petition at 7. Importantly, Petitioner Van Curen strenuously objects to the factual conclusions drawn by Respondent. It was precisely the apparent determination of such factual conclusions by the parole board in a summary fashion that deprived Petitioner of due process.

First, Petitioner could have shown that both a prison priest and psychologist advised him not to list his sponsor as a gay friend because the prison grapevine would then disseminate his homosexuality (Van Curen Dep. at 70, 89-90). He could have proven that the authorities, from police to prosecutor to sentencing judge, knew his sponsor was a former lover (Id. at 59), and that his family treated the sponsor as a relative (Id. at 58).

Second, no matter how offensive the facts, the right to procedural due process is guaranteed. This Court has struck down death penalties and convictions due to violation of fair trial rights where the factual underpinnings presented the most heinous offenses. Of course, the issue Petitioner presents is not whether the factual findings were correct; but rather, whether the manner - summarily, without due process - in which the findings were made comported with due process.

Finally, the underlying facts are not critical because procedural safeguards protect more than the fact finding process. Those safeguards provide a method by which the parole board should exercise its discretion, here on whether whatever Petitioner did justified rescinding his grant of parole. The opportunity to present mitigating evidence and argument was denied. As in Morrissey, the Petitioner should have had an opportunity not only to show "that he did not violate the conditions" of his parole grant but, even if he did, "that circumstances in mitigation suggest that the violation [did] not warrant" rescission. 408 U.S. at 488.

CONCLUSION

Review by this Court of the due process ramifications of parole grants and rescissions is necessary to quell the conflict across the country over what the Due Process Clause protects. For the foregoing reasons, this Petition should be granted.

Respectfully submitted,

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Misc. No. 78-5419

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PRELIMINARY STATEMENT

Petitioner George D. Van Curen respectfully prays through this supplemental brief that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on June 21, 1978.

The petition for writ of certiorari was docketed on September 19, 1978. The reasons then asserted for granting the petition were: (1) the need for resolution of conflicting decisions in the Federal Circuit Courts of Appeals on the due process ramifications of parole grants and rescissions; (2) the importance of the question of federal law; and (3) the deprivation of petitioner's property and liberty interest without due process.

This supplemental brief in support of the petition for a writ of certiorari is filed pursuant to Supreme Court Rule 24-5. It is filed to call the attention of this Court to the opportunity for an orderly resolution of constitutional questions raised by the entire parole process. Subsequent to the filing of Van Curen's petition for certiorari, certiorari was granted in Greenholtz v. Inmates of The Nebraska Penal and Correctional Complex, 576 F.2d 1247 (8th Cir. 1978), cert. granted, No. 78-201, rep't at 47 U.S.L.W. 3190 (Oct. 3, 1978). Greenholtz allows consideration of due process ramifications of discretionary parole processes, yet leaves open the question of rescission. Resolution of petitioner's interest in liberty, coupled with Greenholtz, affords this Court the juncture to fully determine the due process ramifications of the parole process.

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

1. WITH GREENHOLTZ v. INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, 576 F.2d 1274 (8th Cir. 1978), cert. granted, No. 78-201, rep't at 47 U.S.L.W. 3190 (Oct. 3, 1978) PENDING, THE ORDERLY RESOLUTION OF CONSTITUTIONAL QUESTIONS RAISED BY THE PAROLE PROCESS REQUIRES CONSIDERATION OF THE DUE PROCESS RAMIFICATIONS OF PAROLE RESCISSION.

Presently before the Court in Greenholtz v. Inmates of The Nebraska Panel and Correctional Complex, 576 F.2d 1274 (8th Cir. 1978), cert. granted, No. 78-201, rep't at 47 U.S.L.W. 3190 (Oct. 31, 1978), are the questions of whether due process applies to granting or denial of discretionary parole, and, if so, what procedures are constitutionally mandated. A determination of these questions will do much to quell existing judicial conflict. Regardless of the outcome of Greenholtz, however, the due process ramifications of parole rescission will remain unresolved. Resolution of the constitutional questions raised by parole rescission procedures will allow the determination of due process guarantees in the entire parole process.

The nature of the interest in liberty asserted by petitioner Van Curen is distinguishable from that asserted in Greenholtz. Unlike Greenholtz, a grant of a future parole date had allowed petitioner Van Curen to achieve some status in the hierarchy of parole. The State had provided the inmate with a reward for his conduct during incarceration and a recognition of his qualification for parole. The grant of a tentative parole date had given petitioner Van Curen "...more than an abstract need or desire..., more than a unilateral expectation" of parole. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Thus, in contrast to Greenholtz, the question here is whether

the due process clause of the Fourteenth Amendment requires that the state afford an individual some opportunity to be heard prior to rescinding an unexecuted grant of parole." Hulton v. Heggie, 454 F.Supp. 870, 872 (D. Colo. 1978). Petitioner Van Curen's interest in liberty is further distinguishable from those interests recognized in the landmark decisions of Morrissey v. Brewer, 408 U.S. 471 (1972), which held that minimum due process safeguards were necessary prior to revocation of parole, 408 U.S. at 482, and, Wolff v. McDonnell, 418 U.S. 539 (1974), which applied the Morrissey decision to prison disciplinary proceedings involving the potential forfeiture of a prisoner's good time credit.

Unlike Morrissey, the rescission of a grant of parole does not return the person to prison from his state of conditional freedom. Yet, unlike Wolff, the impact of rescission on release is not merely conceivable, it is patent. Thus, consideration of petitioner Van Curen's due process rights in the situation of his parole rescission allows the Court to resolve existing judicial conflict over due process guarantees for the entire parole process.

Despite the developing constitutional framework, as outlined in Morrissey and Wolff, and presently before the Court in Greenholtz, the question of due process ramifications of parole rescission remains unresolved; therefore, the Court should grant this petition.

CONCLUSION

The importance of the due process ramifications of parole grants and rescissions stems from the number of conflicting parole release decisions and their critical signfficance to a prisoner. Petitioner Van Curen's interest in liberty and property affords an orderly resolution of the constitutional questions. For these and the foregoing reasons, the writ must be granted.

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